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Supreme Court, U.S.
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No. 108, Original

In The
Supreme Court of the United States
October Term, 1993
STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

**WYOMING MOTION FOR LEAVE TO FILE
AMENDED COUNTERCLAIMS AND CROSS-CLAIMS,
AMENDED COUNTERCLAIMS AND CROSS-CLAIMS,
AND BRIEF IN SUPPORT OF MOTION FOR LEAVE
TO FILE AMENDED COUNTERCLAIMS AND
CROSS-CLAIMS**

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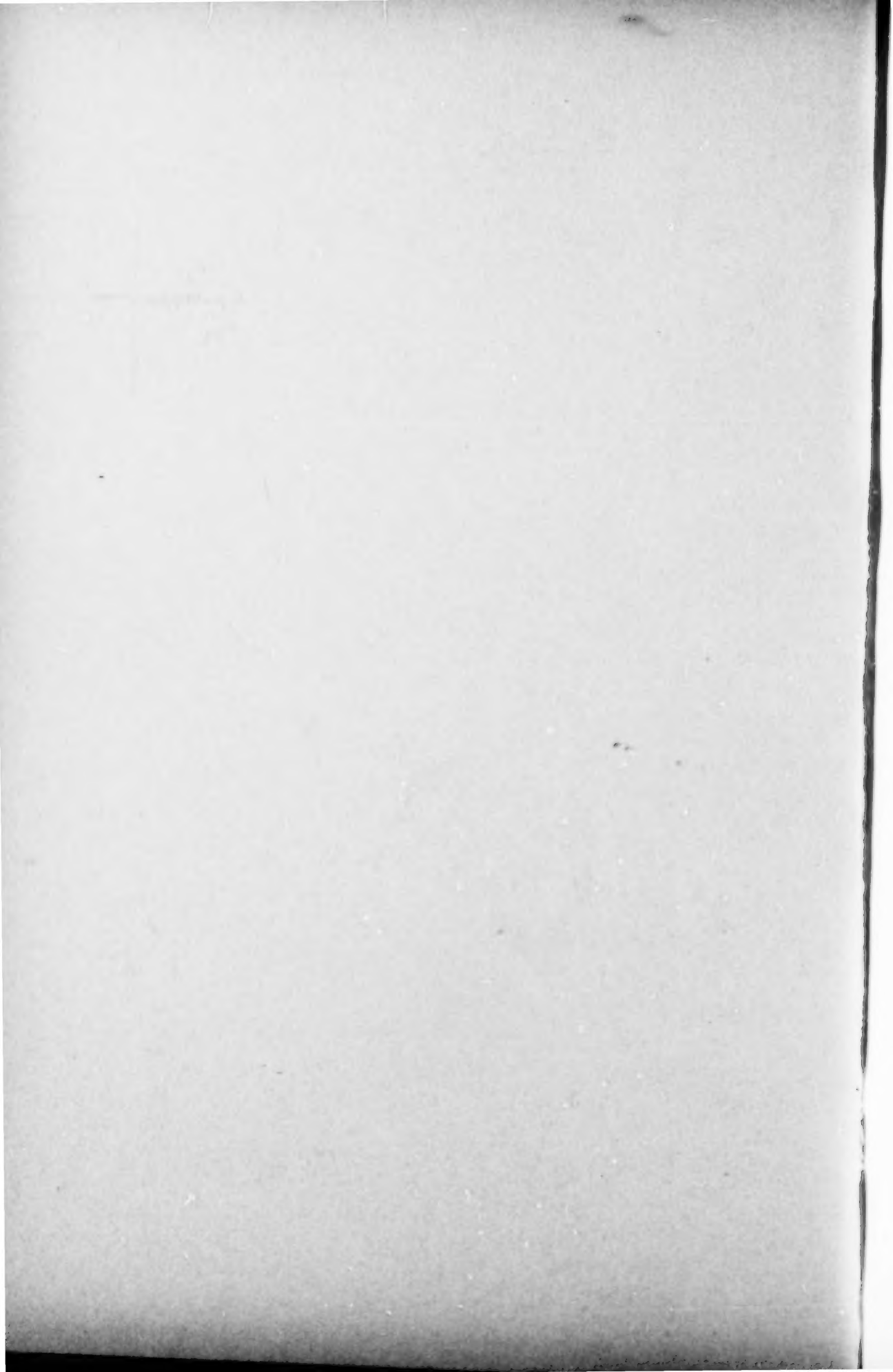
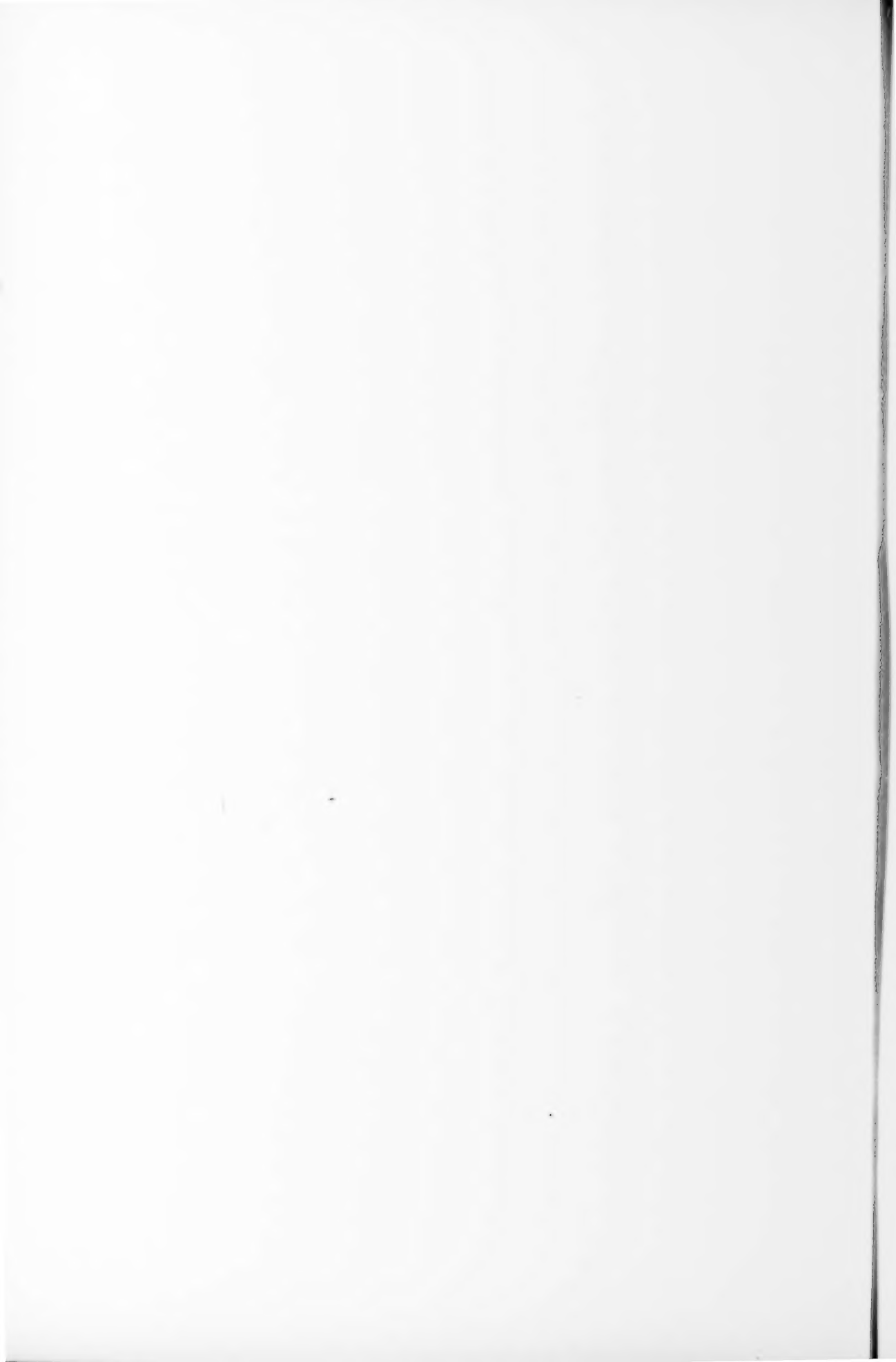


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CLAIMS**



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**WYOMING MOTION FOR LEAVE TO FILE
AMENDED COUNTERCLAIMS AND CROSS-CLAIMS**

Defendant, State of Wyoming, hereby requests leave of the Court to amend its counterclaims against Nebraska, to file additional counterclaims against Nebraska and to file cross-claims against the United States and Colorado. In support of this motion, Wyoming asserts the following grounds:

The Court's opinion of April 20, 1993 clarified that, to the extent it asks for new restrictions on Wyoming's use of Deer Creek or the Laramie River, Nebraska's 1986 Petition in this case may be interpreted to seek modification of the Decree. *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993). However, the Court twice has denied Nebraska leave to amend its petition to go beyond the confines of the existing apportionment by seeking a new apportionment for instream uses or a new apportionment of flows outside the irrigation season. *Nebraska v. Wyoming*, 485 U.S. 931 (1988); *Nebraska v. Wyoming*, 113 S.Ct. 1941 (1993). In view of the Court's previous orders and opinions in this case, Wyoming now seeks leave to amend its existing claims against Nebraska not to claim a new apportionment, but to request modification of the Decree to provide additional relief

where necessary to fully carry out the equitable apportionment previously determined by the Court in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953).¹ Changed conditions such as increased water supply, changes in the United States Bureau of Reclamation's operation of the federal reservoirs, increased diversions and wasteful practices by Nebraska canals and other conditions give rise to these claims pursuant to Paragraph XIII of the Decree.

The first and second counterclaims tendered herewith are not new. They are simply a restatement and clarification of the Wyoming counterclaim which the Court previously accepted for filing. *Nebraska v. Wyoming*, 481 U.S. 1011 (1987); *see* March 18, 1987 Wyoming Answer to Petition, Motion for Leave to File Counterclaim and Counterclaim at 8-9 (Docket No. 5).² The first counterclaim seeks enforcement or modification of the Decree as necessary to give effect to the limits of Nebraska's equitable apportionment and to the Court's corresponding ruling that uses below Tri-State Dam have no equitable claim to direct flow water from Wyoming. The second counterclaim would amend Wyoming's present counterclaim concerning Nebraska's use of Glendo Reservoir storage water by withdrawing the allegation that Nebraska has used that water outside the basin of the North Platte River and by identifying the specific water service contract which Wyoming alleges violates the Decree.

Discovery and pre-trial preparation in this case have also given rise to new claims against Nebraska to modify the Decree with respect to the use of water stored in Glendo Reservoir under Paragraph XVII of the Decree and with respect to the determination and administration of transportation or "carriage" losses on

¹ As used herein "Decree" refers to the 1945 decree, 325 U.S. 665, modified in 1953, 345 U.S. 981.

² "Docket No." refers to the docket maintained by Special Master Olpin as part of the record in this case.

delivery of water pursuant to Paragraph V of the Decree. These new claims likewise are for the purpose of carrying into effect the equitable apportionment previously determined by the Court and are directly related to Wyoming's existing counterclaims. Wyoming does not seek a new apportionment, but only the provision of additional relief in the Decree to give full effect to the previously determined apportionment.

Wyoming also seeks leave to assert against the United States as a party the same claims that are asserted against Nebraska. The inclusion of claims for relief against the United States as a party is necessary for a complete adjudication of the present disputes between Wyoming and Nebraska. Although the Court determined that the United States is an appropriator under Wyoming law and that Wyoming will stand in judgment for the United States, the Court also recognized that the United States' operation of its reservoirs and projects on the North Platte River is restricted by administration of the Decree. *Nebraska v. Wyoming*, 295 U.S. 40 (1935); *Nebraska v. Wyoming*, 325 U.S. 589, 613-616, 630-631 (1945). The United States operates the federal reservoirs which control the majority of the flow of the North Platte River. The United States must be subject to the injunctions in any decree in this case in order to have a complete adjudication of the matters in dispute.

Pursuant to Sup. Ct. R. 17.2, the Federal Rules of Civil Procedure may be taken as a guide in original actions. The counterclaims against Nebraska tendered in the Wyoming amended pleading are in the nature of compulsory counterclaims under Fed.R.Civ.P. 13(a). Further, Fed.R.Civ.P. 13(g) provides that a pleading may state as a cross-claim "any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action." Each of the claims asserted

against the United States or Colorado arises out of a transaction or occurrence addressed either in Wyoming's counterclaims against Nebraska or in Nebraska's 1986 petition.

The United States intervened as a party in the original litigation and fully participated in all aspects of this equitable apportionment. Moreover, the United States has participated to assert and protect its interests as a party in this proceeding. By intervening and participating fully in this case, the United States has consented to exercise of the Court's jurisdiction over the United States with respect to matters of enforcement or modification of the Decree as necessary to give effect to the equitable apportionment determined in the earlier litigation.

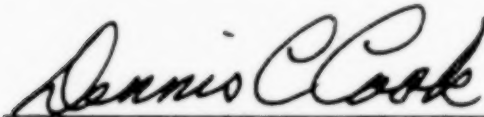
Colorado is joined as a defendant with respect to two claims for modification of the Decree. Such joinder is necessary because Colorado was a party to the original litigation and to the 1953 stipulation for modification of the Decree. Wyoming does not assert that Colorado has violated the apportionment or taken any action that has caused the need to modify the Decree. Wyoming does not seek new injunctions against Colorado and does not seek to modify any of the existing injunctions against Colorado.

Amendment of the pleadings should be freely allowed when, as here, the claims for relief sought to be asserted would not significantly expand or unduly complicate the litigation, have an independent basis in the Court's original jurisdiction, and are within the subject matter over which the Court has already accepted jurisdiction in this case under Paragraph XIII of the Decree.

Therefore, Wyoming respectfully requests the Court to grant leave to file the counterclaims and cross-claims tendered herewith.

Respectfully submitted,

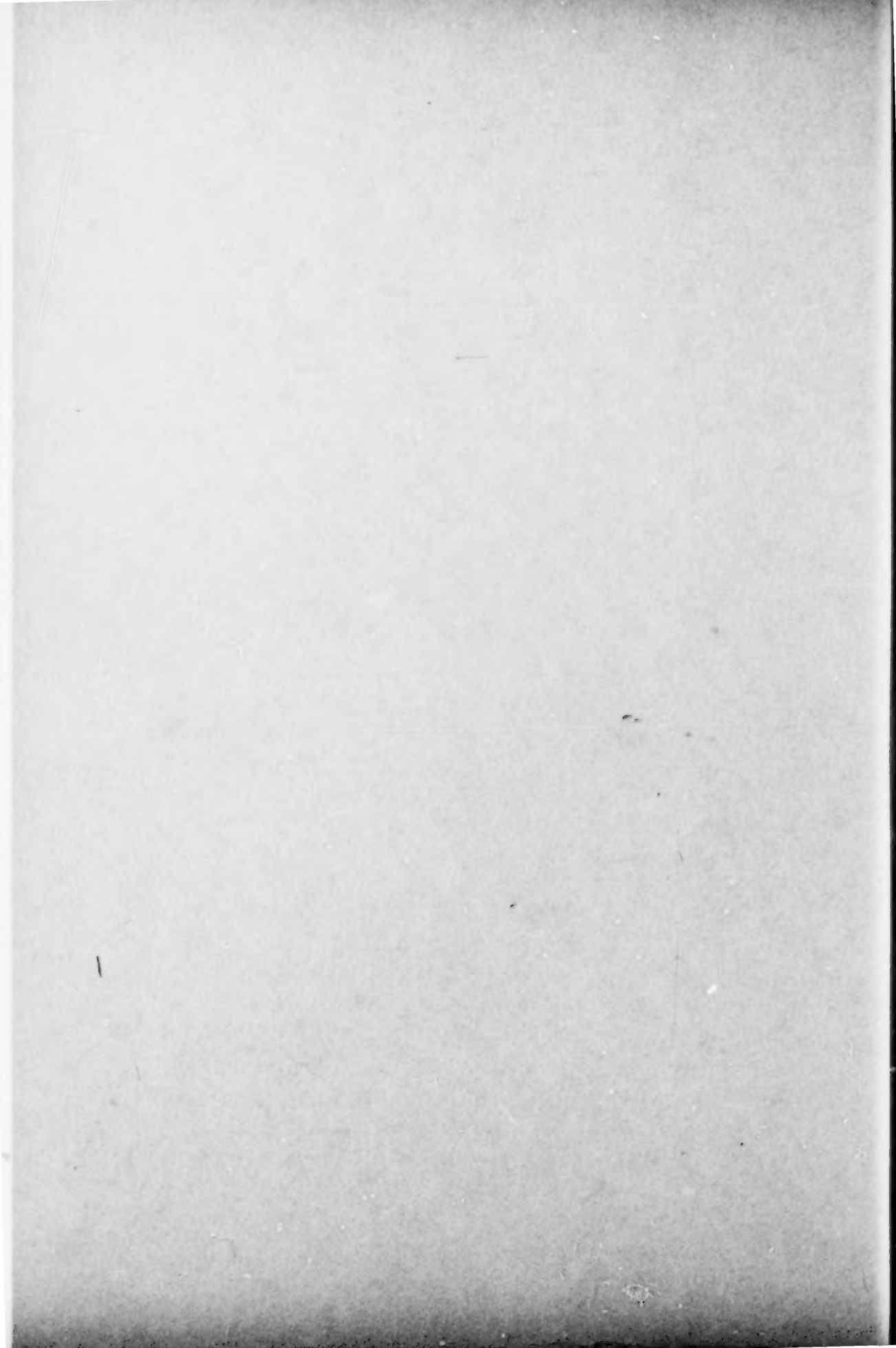
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**WYOMING AMENDED COUNTERCLAIMS AND
CROSS-CLAIMS**

DEFINITIONS

The terms "Nebraska", "the United States" and "federal reservoirs", as used in this document, are defined as follows:

"Nebraska" means the State of Nebraska, its officials and representatives as well as individual and collective users of water within its borders.

"United States" means the United States of America and each of its agencies, representatives or officials having responsibility for administration or operation of any of the federal reservoirs.

"Federal reservoirs" refers to those reservoirs and related facilities on the North Platte River owned and operated by the United States Bureau of Reclamation as part of the North Platte Project, the Kendrick Project or the Kortes or Glendo units of the Pick-Sloan Missouri Basin Program.

GENERAL ALLEGATIONS

The General Allegations in paragraphs 1 through 8 and in paragraphs 34 and 35 are incorporated in each of the counter-claims and cross-claims herein.

1. The Court has jurisdiction of the counterclaims asserted against Nebraska and the cross-claims asserted against Colorado under U.S. Const. art. III, § 2, cl. 2, under 28 U.S.C. § 1251(a), and under Paragraph XIII of the decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945) ("the Decree").

2. The Court has jurisdiction of the cross-claims asserted against the United States herein under U.S. Const. art. III, § 2, cl. 2, under 28 U.S.C. § 1251(b)(2), and under Paragraph XIII of the Decree.

3. In accepting this case, the Court has exercised its retained jurisdiction pursuant to Paragraph XIII of the Decree to consider the need for modification of the Decree in response to a change of conditions that might render the Decree inequitable. Included within the relief available in this case is the addition of injunctive relief or the release of restrictions as necessary to give effect to the apportionment.

4. In 1945, the Court determined that "equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State." *Nebraska v. Wyoming*, 325 U.S. 589, 628 (1945). The Court also held,

If, as the United States fears, the decree is administered so as to divert water from above Tri-State to the use of those diverting

below Tri-State, application for appropriate relief may be made at the foot of the decree.

Id. at 628-629.

5. The equitable apportionment implemented by the Decree was intended to protect the supply of irrigation water to meet the reasonable beneficial use requirements of the Nebraska lands under canals that divert from the North Platte River at and upstream of Tri-State Dam.

6. The Decree is being administered by Nebraska and the United States in such a way as to result in natural flow and federal storage water from Wyoming being delivered to uses in Nebraska diverting below Tri-State Dam that were not included as part of Nebraska's equitable apportionment of the North Platte River.

7. The United States was granted leave to intervene as a party to this case and, as a result, is bound by the Court's Decree and has consented to the full and complete adjudication of all matters and issues determined in the earlier litigation or reasonably incidental thereto.

8. The cross-claims against the United States are for the purpose of carrying into effect the apportionment determined by the Court in 1945, as modified in 1953. As such, they are assertable against the United States as a party.

FIRST COUNTERCLAIM

9. Nebraska has circumvented and violated the equitable apportionment effected by the Decree, and continues to do so, by the actions set forth in this first counterclaim. Such actions have

either violated the Decree or prevented the Decree from carrying into effect the apportionment determined by the Court in its 1945 opinion. As a consequence, the Decree must be enforced, interpreted and modified to add appropriate relief that gives full effect to the apportionment determined by the Court's 1945 opinion.

10. The Court in its April 20, 1993 opinion, *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), concluded that Paragraph IV of the Decree does not impose individual ceilings on the amount of water that may be diverted by an individual canal in Nebraska. The Court acknowledged the continuing dispute over the extent to which Paragraph IV limits the call of the Nebraska State Line Canals against the federal reservoirs. Under Paragraph IV, Wyoming is enjoined to administer the federal reservoirs in priority as to the Nebraska State Line Canals only up to the diversion limits fixed in Paragraph IV. When those diversion limits are exceeded, Wyoming is under no obligation to regulate the storage of water in the federal reservoirs to make water available for diversion by the State Line Canals.

11. Nebraska has circumvented and violated the equitable apportionment by demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam in excess of the beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree and by demanding that the federal reservoirs in Wyoming, which are described in Paragraph IV of the Decree, bypass water to the Nebraska State Line Canals in excess of the diversion limitations and seasonal volumetric limitations fixed in Paragraph IV of the Decree.

12. In recent years the United States has placed a call against water rights in Wyoming that are junior to the water storage rights of the federal reservoirs and Wyoming officials have administered that call by regulating or curtailing such

junior diversions in Wyoming. No such call had ever been placed before 1988.

13. As a result of Nebraska demanding and the United States delivering more water through the federal reservoirs than the Nebraska canals are entitled to under the equitable apportionment, storage in the federal reservoirs has been depleted or foregone, thereby increasing the call by the federal reservoirs to the injury of junior water rights in Wyoming. Nebraska and the United States have failed and refused to recognize or enforce reasonable limits on the diversions by the Nebraska canals.

14. Nebraska has circumvented and violated the equitable apportionment, and continues to do so, by demanding natural flow and storage water from sources above Tri-State Dam and bypassing it or diverting it for uses below Tri-State Dam that are not recognized or authorized by the Decree. Specific examples of such action include,

a. Diverting more water than needed for beneficial, irrigation use and returning such water unused through wasteways to the North Platte River below Tri-State Dam;

b. Knowingly using substantially inflated estimates of the amount of irrigated acreage on which the allowable diversion rates are determined and thereby allowing diversions substantially in excess of the reasonable water requirements of the lands actually irrigated;

c. Failing to adequately monitor and measure the use of water on Nebraska lands under canals diverting in the Guernsey to Tri-State Dam section of the North Platte River;

d. Assuming and applying unreasonably large and unsubstantiated transportation losses in the administration of

storage water deliveries below Tri-State Dam, resulting in substantial quantities of storage water being passed below Tri-State Dam where such storage water is not used in accordance with the contracts governing its use but is converted from storage water to water available for appropriation by other uses below Tri-State Dam;

e. Allowing excessive diversions into the Interstate Canal which result in the storage of natural flow in the Inland Lakes during the irrigation season (1) in excess of the right to store up to 46,000 acre-feet of water during October, November and April each year for the Inland Lakes as established by the Court's April 20, 1993 opinion and (2) without regard to whether such water is needed to meet the beneficial use requirements of the lands using water from the Inland Lakes.

WHEREFORE, Wyoming requests the Court to enjoin Nebraska's continuing circumvention and violation of the apportionment, to modify the Decree as necessary to confirm that equitable apportionment does not allow Nebraska to demand direct flow water from Wyoming for use below Tri-State Dam and to modify the Decree as necessary to confirm that, when the water storage rights of the federal reservoirs have not been fully satisfied, those reservoirs may not bypass water to the Nebraska State Line Canals in excess of the diversion limitations or annual volumetric limitations fixed in Paragraph IV of the Decree.

SECOND COUNTERCLAIM

15. Nebraska has violated Paragraph XVII of the Decree by permitting the delivery of storage water from Glendo Reservoir in the amount of 8,000 acre-feet per year to the Central Nebraska Public Power and Irrigation District for uses other than irrigation and for use as a substitute for storage water previously available under permanent arrangements.

WHEREFORE, Wyoming requests the Court to enjoin further violations of Paragraph XVII of the Decree by Nebraska.

THIRD COUNTERCLAIM

16. In the alternative to the second counterclaim, Wyoming asserts that the restrictions on the place and manner of use of water stored in Glendo Reservoir set forth in Paragraph XVII of the Decree are no longer equitable. Conditions have changed so that such limitations on the place and manner of use of Glendo Reservoir storage water prevent the equitable apportionment of the water storable in Glendo Reservoir as originally intended by the parties and the Court when the Decree was amended in 1953.

17. The intent and purpose of the stipulation modifying the Decree in 1953 was to apportion the use of water stored in Glendo Reservoir in the amount of 25,000 acre-feet per year to Nebraska and 15,000 acre-feet per year to Wyoming.

18. Wyoming and Nebraska have been unable to fully use their respective shares of the Glendo storage water under Paragraph XVII of the Decree within the limitations on place and manner of use imposed by Paragraph XVII. The Decree has failed to carry out the apportionment intended by the 1953 stipulation. The Decree therefore should be modified to remove the restrictions in Paragraph XVII on the place and manner of use of water stored in Glendo Reservoir.

WHEREFORE, Wyoming requests the Court to modify Paragraph XVII of the Decree to allow the 15,000 acre-feet of storage water in Glendo Reservoir allocated to Wyoming and the 25,000 acre-feet of storage water in Glendo Reservoir allocated to Nebraska to be used directly or by exchange for all beneficial uses under the laws of the respective states.

FOURTH COUNTERCLAIM

19. The procedure for determining transportation or "carriage" losses set forth in Paragraph V of the Decree is no longer factually accurate or equitable.

20. The States of Nebraska and Wyoming and the United States have jointly funded technical studies of the transportation losses addressed in Paragraph V. Such studies demonstrate that sufficient data and technology is now available to make a more accurate estimate of transportation losses than the estimate produced by use of the procedure required by Paragraph V of the Decree.

21. The parties have been unable to agree on a procedure for determining transportation losses that would replace those required by Paragraph V of the Decree.

22. The administration of the apportionment of natural flow under the Decree requires the daily segregation of natural flow and storage water in the river. A reasonably accurate determination of carriage losses is essential to that administration. In order to carry into effect the apportionment determined by the Court in 1945, as modified in 1953, more accurate procedures and data should be used in determining and assessing transportation losses.

23. Failure to properly assess transportation losses invalidates the segregation of natural flow and storage necessary to administer the decreed apportionment, upsets the equitable balance of the apportionment and injures Wyoming users.

24. The provision in Paragraph V of the Decree dictating the formula for determination of carriage losses is not necessary and unduly complicates the Decree. The State of Wyoming,

through the office of the Wyoming State Engineer, has the authority and duty to determine and assess carriage losses for storage water deliveries on every stream in Wyoming.

WHEREFORE, Wyoming requests the Court to amend Paragraph V of the Decree to remove the provisions for determination of carriage losses and to leave such determination to state officials under state law.

FIRST CROSS-CLAIM

25. The allegations in paragraphs 9 through 14 of the first counterclaim are hereby incorporated in this first cross-claim.

26. The United States has circumvented and violated the equitable apportionment, and continues to do so, by operating the federal reservoirs to deliver natural flow water for diversion by Nebraska irrigation canals at and above Tri-State Dam in excess of the beneficial use requirements of the lands entitled to water from those canals under the Decree, by failing to store water in the federal reservoirs when available under Paragraph IV of the Decree and by bypassing or releasing water to the Nebraska State Line Canals in excess of the diversion limitations and seasonal volumetric limitations fixed in Paragraph IV of the Decree.

27. The United States has circumvented and violated the equitable apportionment, and continues to do so, by operating the federal reservoirs to bypass river flows and release storage water from sources above Tri-State Dam with knowledge of and acquiescence in the bypass or diversion of such water for uses below Tri-State Dam that are not recognized or authorized by the Decree. Specific examples of actions by the United States that undermine the decreed apportionment include,

- a. Operating the federal reservoirs to deliver to Nebraska users more water than is reasonably required when such deliveries result in the return of water unused through wasteways to the North Platte River below Tri-State Dam;
- b. Delivering water substantially in excess of the beneficial use requirements of the lands actually irrigated in Nebraska by honoring demands for water delivery to Nebraska water users based on irrigated acreage estimates that Nebraska and United States officials know are substantially inflated but which Nebraska officials nevertheless use to set the allowable diversion rates;
- c. Failing to require adequate monitoring and measuring of uses of water on Nebraska lands under canals diverting in the Guernsey to Tri-State Dam section of the North Platte River;
- d. Delivering excessive amounts of Glendo Reservoir storage water and North Platte Project storage water under the Warren Act to Nebraska irrigators and acquiescing in the application by Nebraska officials of unreasonably large and unsubstantiated transportation losses in the administration of storage water deliveries below Tri-State Dam, all of which results in substantial quantities of storage water being passed below Tri-State Dam where such storage water is not used in accordance with the contracts governing its use but is converted from storage water to water available for appropriation by other uses below Tri-State Dam;
- e. Operating the federal reservoirs and canals so as to deliver excessive amounts of natural flow for diversion by the Interstate Canal, resulting in the storage of water in the Inland Lakes during the irrigation season in excess of the storage rights of the Inland Lakes determined by the Court and without regard

to whether such water is needed to meet the beneficial use requirements of the lands using water from the Inland Lakes;

f. Operating the federal reservoirs for the generation of electric power in a manner which interferes with the primary use of the reservoirs for irrigation.

WHEREFORE, Wyoming requests the Court (1) to enjoin the United States' continuing violations of the apportionment, (2) to modify the Decree as necessary to confirm that the equitable apportionment does not allow Nebraska to demand water from Wyoming for use below Tri-State Dam, (3) to modify the Decree as necessary to confirm that, when the water storage rights of the federal reservoirs have not been fully satisfied, those reservoirs may not bypass natural flow to the Nebraska State Line Canals in excess of the diversion limits or annual volumetric limitations fixed in Paragraph IV of the Decree and (4) to enjoin the United States and its officials to operate and administer the federal reservoirs so that water is not released to Nebraska canals in a manner that circumvents the equitable apportionment.

SECOND CROSS-CLAIM

28. The United States has violated Paragraph XVII of the Decree and the federal law governing use of Glendo Reservoir by delivering storage water from Glendo Reservoir in the amount of 8,000 acre-feet per year to the Central Nebraska Public Power and Irrigation District for uses other than irrigation and for use as a substitute for storage water previously available under permanent arrangements.

WHEREFORE, Wyoming requests the Court to enjoin further violations of Paragraph XVII of the Decree and federal law by the United States.

THIRD CROSS-CLAIM

29. In the alternative to the second cross-claim, Wyoming incorporates by reference the third counterclaim, including paragraphs 16 through 18, *supra*, and asserts the claim for modification of Paragraph XVII of the Decree set forth therein as a cross-claim against the United States and the State of Colorado.

FOURTH CROSS-CLAIM

30. The equitable apportionment which the Decree was intended to carry into effect was premised in part on the assumption that the United States would operate the federal reservoirs and deliver storage water in accordance with applicable federal and state law and in accordance with the contracts governing use of water from the federal reservoirs.

31. The United States has failed to operate the federal reservoirs in accordance with applicable federal and state laws and has failed to abide by the contracts governing use of water from the federal reservoirs. Specifically, the United States has allocated storage water in a manner which (a) upsets the equitable balance on which the apportionment of natural flow was based, (b) results in the allocation of natural flow contrary to the provisions of the Decree and contrary to the equitable apportionment, (c) promotes inefficiency and waste of water contrary to federal and state law, (d) violates the contract rights of the North Platte Project Irrigation Districts and violates the provisions of the Warren Act, 43 U.S.C. §523, which provide for sale of storage water to non-project users only if there is available water "in excess of the requirements of the lands to be irrigated under any project" after "preserving a first right to lands and entrymen under the project" and (e) exceeds the limitations in the contracts under the Warren Act.

32. Such action by the United States has caused water shortages to occur more frequently and to be more severe, thereby causing injury to Wyoming and its water users.

WHEREFORE, Wyoming requests the Court (1) to declare that the United States' allocation procedure is contrary to the equitable apportionment, to applicable federal and state law and to the contracts governing use of water from the North Platte Project, (2) to enjoin the United States' continuing violations of federal and state law and (3) to direct the United States to comply with the terms of its contracts.

FIFTH CROSS-CLAIM

33. The fourth counterclaim, including paragraphs 19-24, *supra*, is hereby incorporated and the claim for modification of Paragraph V of the Decree to provide for more accurate determination of transportation losses is asserted as a cross-claim against the United States and the State of Colorado.

FURTHER GENERAL ALLEGATIONS

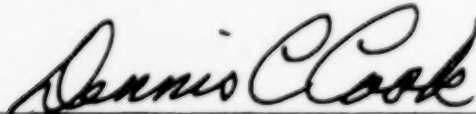
34. The past and continuing violations of the Decree or the equitable apportionment intended to be effected by the Decree by Nebraska and the United States have caused and continue to cause irreparable injury to Wyoming and its citizens. The waste of water delivered to Nebraska canals has caused water shortages to occur more frequently and to be more severe, has resulted in calls by the United States for regulation or curtailment of Wyoming water rights that are junior to the federal reservoirs, and has interfered with potential water development in Wyoming that would have otherwise taken place under the equitable apportionment.

35. Wyoming has no adequate remedy at law to enforce its rights against Nebraska and the United States. Injunctive relief is necessary to enforce the Decree, to modify the Decree where necessary to carry out the previously determined equitable apportionment and to restrain further circumvention and violation of that apportionment by Nebraska and the United States.

WHEREFORE, Wyoming prays that the Court enter an order granting judgment for Wyoming on the counterclaims and cross-claims asserted herein, enjoining Nebraska and the United States from further violations of the Decree, providing for additional relief as necessary to carry into effect the previously determined equitable apportionment of the North Platte River and granting such further relief as the Court may deem just and proper.

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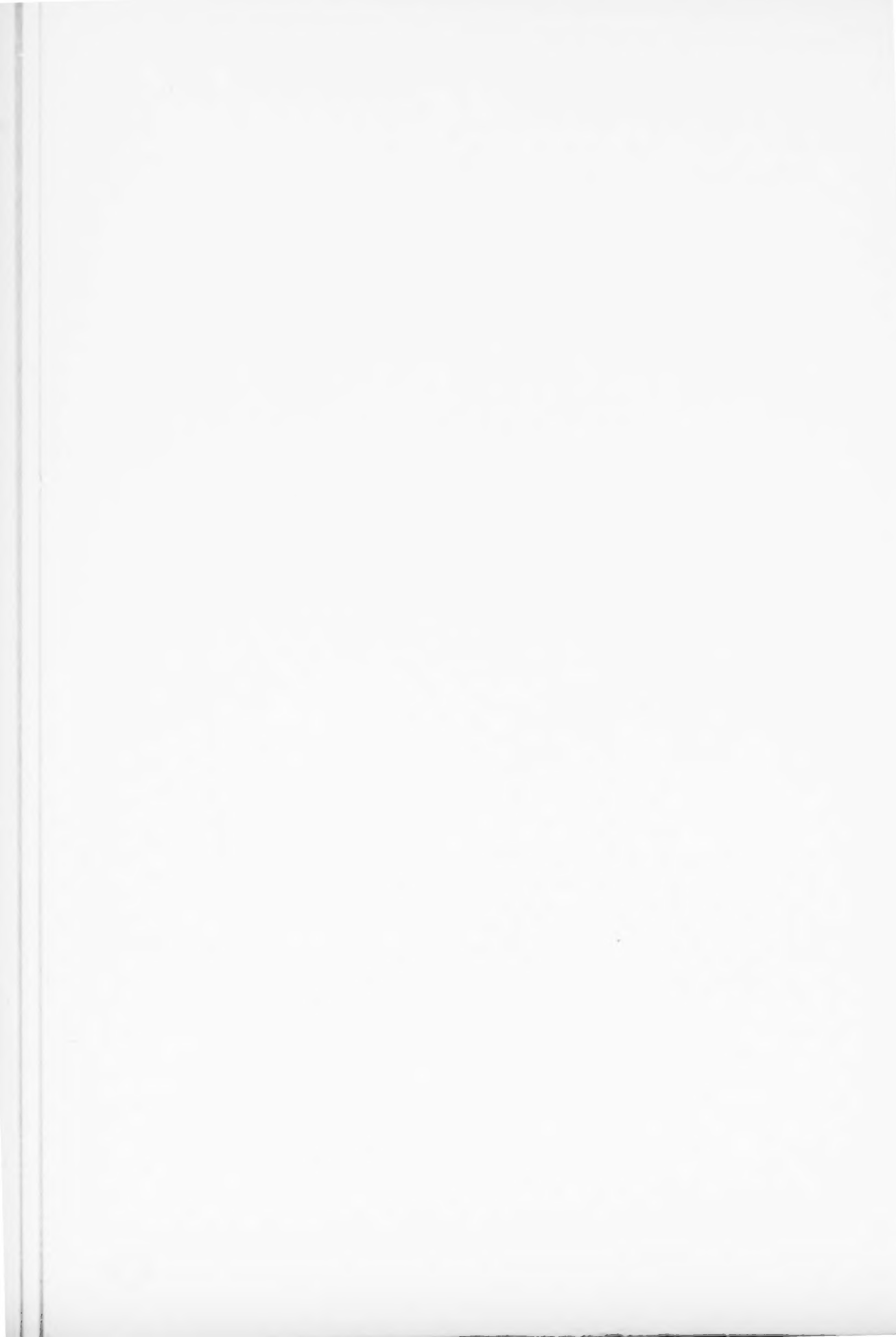


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I. JURISDICTION

Wyoming seeks leave of the Court in this original action to amend its pleadings to assert counterclaims against the State of Nebraska and cross-claims against the United States and the State of Colorado. The Court has jurisdiction of the counterclaims asserted against Nebraska and the cross-claims asserted against Colorado under U.S. Const., art. III, §2, cl. 2, under 28 U.S.C. §1251(a) (1988) and under Paragraph XIII of the Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), modified 345 U.S. 981 (1953) ("the Decree"). The Court has jurisdiction of the cross-claims asserted by Wyoming against the United States under U.S. Const. art. III, §2, cl. 2, under 28 U.S.C. §1251(b)(2) (1988), and under Paragraph XIII of the Decree. The United States has consented to exercise of the Court's jurisdiction over it by intervening as a party in this litigation. *Nebraska v. Wyoming*, 304 U.S. 545 (1938).

II. INTRODUCTION AND STATEMENT OF THE CASE

A. PRIOR PROCEEDINGS

Nebraska's petition to enforce the apportionment of the North Platte River was filed on October 7, 1986 (Docket No. 1),¹ and was accepted by the Court on January 20, 1987. *Nebraska v. Wyoming*, 479 U.S. 1051 (1987). Wyoming's answer and counterclaims were filed March 18, 1987 (Docket No. 5) and accepted by the Court on April 20, 1987. *Nebraska v. Wyoming*, 481 U.S. 1011 (1987). The matter was referred to Special Master Owen Olpin on June 22, 1987. *Nebraska v. Wyoming*, 483 U.S. 1002 (1987). On September 11, 1987, Wyoming filed its first motion for summary judgment with the Special Master addressing Nebraska's claims of Decree viola-

¹ "Docket No." refers to the docket that has been maintained by Special Master Olpin as part of the record in this case.

tion (Docket No. 23). While Wyoming's summary judgment motion was pending before the Special Master, Nebraska filed a motion for leave to file an amended petition which the Court denied. *Nebraska v. Wyoming*, 485 U.S. 931 (1988). Nebraska's first amended petition would have sought modification of the Decree to provide a new apportionment for instream uses in Central Nebraska (Docket No. 47). Subsequently, the Special Master denied Wyoming's motion for summary judgment but left open the possibility of later summary disposition of any of the claims. First Interim Report of Special Master, accepted for filing by the Court June 26, 1989, *Nebraska v. Wyoming*, 492 U.S. 903 (1992).

Following a period of discovery, all four parties filed cross-motions for summary judgment. While those cross-motions for summary judgment were pending, Nebraska again sought leave to file an amended petition (Docket No. 407). The Court decided the cross-motions for summary judgment in its April 20, 1993 opinion. *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993). One week later, the Court denied Nebraska leave to file Count I of its amended petition which would have sought a new apportionment of the non-irrigation season flows of the North Platte River based primarily on allegations of injury to uses below Tri-State Dam.² *Nebraska v. Wyoming*, 113 S.Ct. 1941 (1993). The Court referred Nebraska's motion for leave to file Counts II and III of its tendered amended petition to the Special Master for recommendation. Count II would bring additional claims against Wyoming for alleged violation of Nebraska's apportionment and Count III would bring claims against the United States for alleged violation of Nebraska's apportionment. (Docket No. 407).³

² Tri-State Dam constitutes the downstream terminus of the equitable apportionment under the 1945 Decree. *Nebraska v. Wyoming*, 325 U.S. 589, 628-629 (1945).

³ Nebraska announced at a recent status conference with the Special Master that it likely would withdraw Counts II and III of its pending amended petition and incorporate an amended version of those counts in another motion for leave to file amended petition. Transcript of January 21, 1994 status conference at 13.

B. SCOPE OF THE PRESENT CASE

Much of the argument in this case has focused on the question of whether Nebraska's 1986 petition was one for enforcement or for modification of the Decree. Three differing interpretations of the scope of the case presented by that petition have been asserted:

(1) Wyoming argued originally that the Court exercised jurisdiction over Nebraska's 1986 petition solely for the purpose of enforcing rights that were determined in the Decree. That position was rejected by the Court in its recent opinion. *Nebraska v. Wyoming*, 113 S.Ct. at 1695.

(2) The Court in its April 20, 1993 opinion also rejected Nebraska's arguments that the proposed construction of Deer Creek Reservoir and developments on the Laramie River violate the Decree, but read Nebraska's petition broadly enough to encompass a request for imposition of new injunctions. *Id.* at 1695-1696. In doing so the Court held that Nebraska could litigate matters that were not determined or not fully determined in the original litigation. However, the Court has not accepted any claims to relitigate matters that were previously determined. That fact is evidenced by the denial of the two requests by Nebraska to amend its pleadings to seek a new apportionment for non-irrigation season uses and for uses below Tri-State Dam. *Nebraska v. Wyoming*, 485 U.S. 931 (1988); *Nebraska v. Wyoming*, 113 S.Ct. 1941 (1993).

(3) A third view of the case expressed by some of the *amici* is that, under the present pleadings, the Court will undertake a complete reweighing of the equities, including the issue of whether Nebraska is entitled to an apportionment for uses below Tri-State Dam, such as instream uses in the Central Platte for wildlife habitat. Response of Platte River Whooping Crane Critical Habitat Maintenance Trust to Memorandum of Nebraska of Laramie River Claims (filed with the Special Master December 14, 1993) (Docket No. 603). Such an expansive view of the case ignores the fact that the

Court has twice denied Nebraska leave to bring those very claims for a new apportionment.

The Court did say that "[a]t least where the case concerns the impact of new development, the inquiry may well entail the same sort of balancing of equities that occurs in an initial proceeding to establish an equitable apportionment." *Nebraska v. Wyoming*, 113 S.Ct. at 1695. However, considering the equity of imposing new injunctions or releasing existing injunctions within the existing apportionment is not the same as considering a claim for a new or different apportionment. The only interpretation that gives effect to both the April 20, 1993 opinion and the Court's orders denying Nebraska leave to amend is one that distinguishes between modification of the Decree and modification of the underlying equitable apportionment. While the Court has indicated a willingness to consider the need for modification of the Decree to give effect to the original apportionment, it has not opened the case to an unlimited reconsideration of the apportionment or to a complete reweighing of the equities on which the apportionment was based.

C. SCOPE OF WYOMING'S AMENDED PLEADING

The pleading amendments now tendered by Wyoming are premised on the view that the Court has not exercised its jurisdiction to entertain claims of a completely new apportionment or claims for relitigation of matters that were litigated and determined in the earlier proceedings. Where Wyoming's amended claims would seek modification of the Decree, the purpose is to request additional relief as necessary to give effect to the previous apportionment.

The first and second counterclaims in the amended pleading tendered herewith would amend the existing counterclaims against Nebraska as follows:

(1) To clarify that the relief sought by Wyoming might involve modification of the Decree in order to provide relief in the

form of injunctions against Nebraska to carry into effect the apportionment determined by the Court in the 1945 opinion;

(2) To add specificity to the claims that Nebraska has circumvented the Decree by bypassing or diverting water around Tri-State Dam for use below Tri-State Dam; and

(3) To withdraw the specific allegation that Nebraska has used Glendo Reservoir storage water outside the basin of the North Platte River in violation of Paragraph XVII of the Decree.

The amended pleading tendered herewith also includes two new counterclaims against Nebraska for modification of the Decree. The third counterclaim, as an alternative to the second counterclaim alleging a violation of Paragraph XVII of the Decree by use of Glendo Reservoir water, would request the modification of Paragraph XVII to remove restrictions on the place and manner of use of Glendo Reservoir storage water. The fourth counterclaim would ask the Court to remove the predetermined carriage loss values now contained in Paragraph V of the Decree.

Wyoming's amended pleading also would bring a number of cross-claims against the United States (1) to join the United States in each of the counterclaims asserted against Nebraska and (2) to challenge the United States' operation of the federal reservoirs as contrary to the equitable apportionment. Also, Wyoming's amended pleading would join Colorado as a defendant with respect to the third and fourth counterclaims against Nebraska. Such joinder would be for the sole purpose of insuring that Colorado has notice of and an opportunity to be heard concerning the requested modification of the Decree. Wyoming does not allege that Colorado has violated the apportionment or taken any action that has caused a need to modify the Decree. Wyoming does not seek new injunctions against Colorado and does not seek to modify any of the existing injunctions against Colorado.⁴

⁴ Wyoming did not file cross-claims initially against the United States or Colorado but left open the possibility of such claims as the case developed and the need for such claims became apparent. Wyoming Motion for Leave to File Counterclaim at 8 (Docket No.5).

III. SUMMARY OF ARGUMENT

Wyoming's original counterclaim was brought for the purpose of obtaining a clearer definition of Nebraska's apportionment. The amended counterclaims that Wyoming now tenders have that same purpose.

Wyoming's evidence in support or in defense of claims already accepted by the Court will establish wasteful and inefficient practices by Nebraska and the United States. Such practices have depleted the federal reservoirs resulting in more frequent and more severe curtailment of water deliveries in Wyoming and excess flows below Tri-State Dam. Wyoming must defend against Nebraska's claims that the Deer Creek and Laramie River projects violate the apportionment, while Nebraska and the United States permit excess diversions, inefficiency and waste on Nebraska's lands protected by the apportionment. Nebraska's claims, more than anything else, demonstrate the injury Wyoming suffers so long as Nebraska's apportionment remains essentially undefined. Without a clearer definition of Nebraska's apportionment, Wyoming would continue to face uncertainty and a threat of costly litigation whenever its users propose some change of use or new development in the North Platte basin.

The original apportionment in this case expressly apportioned only natural flows below Guernsey Dam. But that apportionment was predicated upon a certain operation of the federal reservoirs to deliver storage water to uses below Guernsey Dam as much as it was predicated on the specific restrictions imposed on irrigation in Wyoming and Colorado and the specific priorities assigned to the federal reservoirs. Decree Paragraphs I through V. Wyoming's cross-claims would require the United States to operate the federal reservoirs in accordance with the storage contracts and the manner of operation on which the court based the apportionment.

Wyoming's amended pleading would not seek a new or different apportionment, but would seek new injunctions in the Decree or the release of existing injunctions to carry out the original

apportionment. It would allow a complete review of the operation of the river, including the administration of storage water under the existing Decree before adding or modifying any injunctions.

IV. ARGUMENT

A. LEAVE TO AMEND THE WYOMING PLEADINGS SHOULD BE GRANTED BECAUSE THE TENDERED CLAIMS MEET THE STANDARDS OF THE COURT FOR EXERCISE OF ITS ORIGINAL JURISDICTION AND WOULD NOT UNDULY EXPAND OR COMPLICATE THE LITIGATION.

1. Amended Pleadings Must Satisfy the Standards for Exercise of the Court's Original Jurisdiction.

The Federal Rules of Civil Procedure, which may be used as a guide in original actions, provide that leave to amend a pleading should be "freely given when justice so requires." Fed.R.Civ.P. 15(a); Sup.Ct.R. 17.2. However, an amended pleading to assert additional claims or to substantially change existing claims must meet the standards laid down by the Court for exercise of the Court's original jurisdiction. *Ohio v. Kentucky*, 410 U.S. 641 (1973); *California v. Nevada*, 447 U.S. 125 (1980). Whether claims are raised by an original or by an amended pleading, the Court will exercise the same "substantial discretion to make case by case judgments" about the appropriateness of exercising its original jurisdiction. *Ohio v. Kentucky*, *supra*; *California v. Nevada*, *supra*; *Texas v. New Mexico*, 462 U.S. 554, 570 (1983).

Generally the Court will exercise its original jurisdiction to enjoin the activities of one sovereign state at the instance of another only where injury of a serious magnitude is shown by clear and convincing evidence. *Connecticut v. Massachusetts*, 282 U.S. 660

(1931); *Idaho v. Oregon*, 462 U.S. 1017 (1983). However, in this case the Court has held that Paragraph XIII of the Decree may ease a party's threshold burden to establish that a claim falling within the purview of Paragraph XIII should be accepted by the Court. *Nebraska v. Wyoming*, 113 S.Ct. at 1696.

2. Wyoming's Amended Counterclaims and Cross-Claims are Asserted for the Purpose of Carrying into Full Effect the Apportionment Determined in the 1945 Litigation.

Wyoming's amended pleading would seek the imposition of additional injunctions and the release of existing injunctions for the purpose of carrying into effect the underlying apportionment. The Decree itself is a series of limited injunctions deemed necessary by the Court to carry into effect the interstate equitable apportionment that was determined in the Court's 1945 opinion. See *Nebraska v. Wyoming*, 325 U.S. at 657 and *Arizona v. California*, 373 U.S. 546, 602 (1963) (the Court, in both cases, after deciding the controversy among the states over the interstate apportionment of a river, directed the parties to devise a form of decree to carry the opinion into effect). See also generally *United States v. United Shoe Corp.*, 391 U.S. 244 (1968).

Not all matters that were determined conclusively in the earlier litigation were necessarily included as injunctions in the Decree. For example, the Court recently found that Nebraska's apportionment determined in the earlier litigation included the right to store 46,000 acre-feet in the Inland Lakes during October, November and April, despite the Decree's silence with respect to the Inland Lakes. *Nebraska v. Wyoming*, 113 S.Ct. at 1697. In that instance, the Court recognized that "when the decree is silent or unclear, it is appropriate to consider the underlying opinion, the Master's Report, and the record in the prior proceedings to determine whether the Court previously resolved the issue." *Id.* at 1695, citing *Wyoming v. Colorado*, 286 U.S. 494, 506-508 (1932).

In the earlier litigation, the Court unequivocally determined that, as a matter of equitable apportionment, Nebraska's uses diverting below Tri-State Dam were adequately supplied by local sources, including return flows, and that Nebraska was not entitled to demand water from Wyoming for such uses. *Nebraska v. Wyoming*, 325 U.S. at 628. Special Master Doherty stated the matter plainly:

The conclusion is that Nebraska's claim for equitable apportionment of water originating above the Wyoming State line is in all events limited to the North Platte Project and State Line Canals and the lands supplied by them.

Report of Michael J. Doherty, Special Master, at 96. The United States, fearing that Nebraska might find a way to do indirectly that which the Court held it could not do directly, asked the Court to include injunctions in the Decree to assure that Nebraska could not require natural flow water to be delivered from Wyoming for use below Tri-State Dam. The Court declined to include such injunctions specifically limiting Nebraska's diversions, but anticipated the possibility that relief at the foot of the Decree would be required and expressly retained jurisdiction for that purpose. *Nebraska v. Wyoming*, 325 U.S. at 629. Wyoming's existing counterclaim invoked that retained jurisdiction, not to relitigate decisions rendered in the Court's 1945 opinion, but to demonstrate that the Decree may now need to be adjusted to carry out the Court's decision.

In recent years Nebraska's administration of the natural flow and storage rights for Nebraska lands has been calculated to force as much water as possible below Tri-State Dam so that Nebraska could then claim equitable reliance on such flows. Nebraska's diversions in the Guernsey to Tri-State section have far exceeded the beneficial use requirements found by Special Master Doherty. Affidavit of Bern S. Hinckley at 5-7, ¶¶ 8-10, Wyoming Second Motion for Summary Judgment (Docket No. 294). Supplies to canals below Tri-State Dam to Bridgeport, Nebraska have also been greater than

the beneficial use requirements determined by Special Master Doherty. Second Affidavit of Bern S. Hinckley, Figure 1, Wyoming Brief in Opposition to Nebraska's Motion to Recommend an Apportionment of Non-Irrigation Season Flows (Docket No. 316). While enjoying such increased supplies, Nebraska has opposed even the smallest of new developments in Wyoming. The purpose of Wyoming's counterclaim was to obtain a clearer definition of Nebraska's apportionment so that Wyoming would not face expensive and time consuming litigation every time some new development takes place in the North Platte basin.

Where Wyoming asks for modification of the existing Decree, it does so because the Decree is not accomplishing its intended purpose. In similar circumstances where the Court has been asked to approve a modification of an equitable decree, it has consistently focused on the purpose of the decree — to carry out the underlying decision. For example, *United States v. Swift and Co.*, 286 U.S. 106, 115 (1932), confirmed the power of a court in equity to modify a decree in an anti-trust suit, even when the decree was entered originally upon consent of the parties, if a provision of the decree has "been turned through changing circumstances into an instrument of wrong." The *Swift* opinion held that one seeking to be relieved of injunctions in a decree must make a "clear showing of grievous wrong." *Id.* at 119. Recently the Court tempered the rule of *Swift*, suggesting the need for flexibility in considering a request for release from injunctions in a decree based on changed conditions. *Rufo v. Inmates of the Suffolk County Jail*, 112 S.Ct. 748, 758 (1992) ("the 'grievous wrong' language of *Swift* was not intended to take on a talismanic quality").

In *United States v. United Shoe Corp.*, 391 U.S. 244, 251-252 (1968), the Court allowed modification of a decree to impose additional restraints or injunctions:

If the decree has not, after 10 years, achieved its "principal objects," namely, "to extirpate practices that have caused or may hereafter cause monopolization, and to restore workable competition in the

market" — the time has come to prescribe other, and if necessary more definitive means to achieve the result.

Whether the proposed modification of a decree is to relieve a defendant of injunctions⁵ or to impose new restrictions, the overriding concern of the Court is to accomplish the underlying purpose of the decree. In this case, that purpose is to carry out the apportionment determined in the Court's 1945 opinion.

The claims for modification of the Decree that Wyoming's amended pleading would bring are in sharp contrast to the amended claims Nebraska sought to bring in its first motion to amend (Docket No. 47) and in Count I of its second motion to amend (Docket No. 407). In each of those pleadings, Nebraska sought to relitigate the Court's 1945 decision to obtain a new or changed apportionment of water from Wyoming for uses in Nebraska below Tri-State Dam. The Court denied each of those amendments without opinion. *Nebraska v. Wyoming*, 485 U.S. 931 (1988); *Nebraska v. Wyoming*, 113 S.Ct. 1941 (1993). The thrust of Wyoming's opposition to Nebraska's previous motions to amend was that they would have transformed this case into a much larger and more complicated action for the reapportionment of the river. By contrast, the amended pleading that Wyoming tenders should be accepted for filing because it seeks not to undo the apportionment that the Court

⁵ Special Master Doherty recognized that the apportionment was based upon water supply conditions that existed during a severe drought in the 1930's. He therefore recommended that the Court retain jurisdiction

to amend the decree upon a showing of such change of conditions as might render the operation of the decree inequitable. This recommendation contemplates particularly the possibility of the passing of the present drought cycle and the future availability of far greater water supplies comparable with those of former years which might justify a release of some or all of the restrictions now proposed.

formulated in the 1945 decree, but to give that apportionment full force and effect in light of conditions that have changed since entry of the Decree.

B. THE AMENDED COUNTERCLAIMS AGAINST NEBRASKA RAISE ISSUES THAT SHOULD BE ADDRESSED IN THE CASE AS PRESENTLY POSTURED.

Each of the counterclaims asserted in Wyoming's amended pleading is directly related to matters already part of this case under Nebraska's 1986 petition, as interpreted by the Court's April 20, 1993 opinion. *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993). Fed.R.Civ.P. 13(a) defines a "compulsory counterclaim" as one which "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." With that rule as a guide, Wyoming's amended counterclaims are in the nature of compulsory counterclaims and should be accepted by the Court in order to provide for a complete adjudication of the Decree-related issues already before the Court.

1. Wyoming's First Counterclaim Would Clarify a Counterclaim that has Already been Accepted by the Court.

The Wyoming counterclaim that the Court accepted for filing in 1987 was brought under Paragraph XIII of the Decree and asserted in part,

2. Nebraska has intentionally circumvented and violated the Decree, and continues to do so, by the following actions:

(a) By demanding natural flow water for diversion by irrigation canals at and above Tri-State

Dam (including the Ramshorn Canal) in excess of the present beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree;

(b) By demanding natural flow and storage water from sources above Tri-State Dam and by-passing it or diverting it for uses below Tri-State Dam that are not recognized or authorized by the Decree;. . .

Wyoming Answer to Petition, Motion for Leave to File Counterclaim and Counterclaim at 8-9, accepted for filing 481 U.S. 1011 (1987) (Docket No. 5).

Wyoming alleged that Nebraska not only violated the Decree, but also "circumvented" the Decree by excessive diversions and other actions that resulted in water going past or around Tri-State Dam. Wyoming asserted that such action was contrary to the Court's 1945 ruling that "equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State." *Nebraska v. Wyoming*, 325 U.S. at 628. The allegation that Nebraska "circumvented" the Decree was an obvious reference to the problem anticipated by the Court in 1945:

We cannot assume that Nebraska will undertake to circumvent the decree. . . If, as the United States fears, the decree is administered so as to divert water from above Tri-State to the use of those diverting below Tri-State, application for appropriate relief may be made at the foot of the decree.

Id. at 628-629.

No party has questioned that the imposition of new injunctions to carry out the apportionment is within the scope of relief that the Master might recommend or the Court might adopt if Wyoming

proved its existing counterclaim. The first purpose of Wyoming's amended first counterclaim therefore is simply to clarify that modification of the Decree is part of the relief that Wyoming seeks.

The second purpose for amending the first counterclaim against Nebraska is to include specific allegations concerning the actions in Nebraska that Wyoming alleges to violate the apportionment. Wyoming has undertaken substantial discovery and technical studies since filing its original counterclaim in 1987. This part of the amendment, while probably not necessary under the principle of notice pleading, is made in the interest of providing Nebraska and the Court with a more detailed description of the Nebraska actions that are the subject of Wyoming's counterclaim.

Because there is no substantive change in the counterclaim that would enlarge the Court's jurisdiction or the scope of relief sought, the Court should grant leave to file Wyoming's first counterclaim.

2. Wyoming's Second Counterclaim Merely Would Narrow a Counterclaim that has Already Been Accepted by the Court.

Wyoming's existing counterclaim in part alleges that Nebraska has violated and circumvented the Decree by, "using Glendo Reservoir water outside of the basin of the North Platte River in western Nebraska, for uses other than irrigation and as a substitute for storage water previously available under permanent arrangements." Wyoming Answer to Petition, Motion for Leave to File Counterclaim and Counterclaim at 9 (Docket No. 5).

The second counterclaim in Wyoming's amended pleading would (1) identify the specific contract for Glendo Reservoir water which Wyoming claims violates the Decree, and (2) delete the allegation that water under that contract has been used on lands outside the basin of the North Platte River. The Court should grant leave to file Wyoming's second counterclaim because it would narrow the issues for trial without prejudice to any other party.

3. Wyoming's Third Counterclaim Would Introduce an Alternative Claim for Modification of Paragraph XVII of the Decree.

Both Nebraska and Wyoming have alleged that uses of Glendo Reservoir storage water in the other state violate Paragraph XVII of the Decree.⁶ See Count II of Nebraska's pending amended petition (Docket No. 407); Wyoming second counterclaim, *supra*. Paragraph XVII now provides that storage water from Glendo Reservoir "may be used for the irrigation of lands in the basin of the North Platte River in western Nebraska to the extent of 25,000 acre-feet annually, and for the irrigation of lands in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir to the extent of 15,000 acre-feet annually, provided that it shall not be used as a substitute for storage water contracted for under any existing permanent arrangements."

Paragraph XVII was added to the Decree upon the joint motion of the parties. *Nebraska v. Wyoming*, 345 U.S. 981 (1953). That stipulation and the amendment of the Decree cleared the way for construction of Glendo Reservoir. Each of the parties was to realize a substantial benefit from the stipulation. The injunction limiting irrigation in the North Platte basin in Colorado was modified to allow Colorado to irrigate an additional 10,000 acres. Decree, Paragraph I(a). The United States was able to build Glendo Reservoir and to use nearly one-half million acre-feet of storage space in that reservoir to re-store water released from Pathfinder Reservoir for power generation. Decree, Paragraph XVII(b). That change greatly increased the power generation capacity of the federal reservoir system as well as the revenues associated with

⁶ At a telephonic status conference with the Special Master on January 21, 1994, Nebraska indicated that it would withdraw the part of Count II that challenges the United States' water allocation procedures, but apparently Nebraska continues to assert that certain actions of the United States violate Paragraph XVII. Transcript of January 21, 1994 status conference at 13.

power generation while not interfering with the United States' obligation or ability to deliver irrigation water. Nebraska and Wyoming were to have the use of additional storage water in the amounts of 25,000 acre-feet and 15,000 acre-feet per year, respectively with the ability to carry over storage up to a total storage amount of 100,000 acre-feet. Decree, Paragraph XVII(b).

Nebraska, Colorado and the United States have realized the benefits of Glendo Reservoir apportioned to them in the 1953 modification of the Decree. However, Wyoming users have contracted for only 4650 acre-feet of the 15,000 acre-feet of Glendo storage water apportioned to Wyoming. Wyoming has not been able to use the majority of its apportioned share of Glendo water under the present language of Paragraph XVII, which limits such use to irrigation use downstream of Guernsey Dam. In short, changed circumstances have resulted in Wyoming being denied the benefits of the apportionment that the 1953 modification of the Decree was intended to carry into effect.

Of course, the Court does not lightly undertake to remove restrictions in a decree. It has been said that the party asking for such a modification of a decree must demonstrate that it is suffering "grievous wrong" from operation of the injunction that it would have lifted or changed. *United States v. Swift and Co.*, 286 U.S. at 119. In this case, the inability to use Wyoming's apportioned share of Glendo Reservoir certainly rises to the level of such hardship as to warrant modification of the Decree. Moreover, both Special Master Doherty and the Court, when fashioning the Decree, anticipated that the Decree would need to be adjusted to meet changing circumstances such as increased water supply. Report of Michael J. Doherty, Special Master, at 10-11; *Nebraska v. Wyoming*, 325 U.S. at 620. The need for a change in Paragraph XVII is partly and directly the result of a greater water supply than anticipated being available to both Wyoming and Nebraska.

The fact that Paragraph XVII of the Decree was added by consent and stipulation of the parties does not affect the Court's power to modify the Decree. See *United States v. Swift and Co.*, 286

U.S. at 114-115 (1932). Whether the Decree was entered after litigation or after consent, the Court may change it "in adaptation to changed conditions" when its purpose is no longer being served. *Id.*; *United States v. United Shoe Corp.*, 391 U.S. 244 (1968).

When the 1953 stipulation was being negotiated, the parties contemplated that the supplemental irrigation water to be made available by Glendo Reservoir would be used by canals in the area between Guernsey Dam and Scottsbluff, Nebraska. Definite Plan Report, Glendo Unit, December 31, 1952, at 4-6, Third Affidavit of David G. Wilde, United States Motion for Summary Judgment on the Inland Lakes (Docket No. 297). However, in the 35 years since Glendo water was first made available, that anticipated demand for the water has not materialized. The last 8,000 acre-feet of Nebraska's share of Glendo water is under contract to the Central Nebraska Public Power and Irrigation District ("CNPPID") for delivery each fall to Lake McConaughy. The water is delivered for re-storage in Lake McConaughy, although CNPPID claims that such water is used to replace water delivered for the irrigation of lands lying in the lower reaches of the North Platte Basin.⁷ In the second counterclaim, Wyoming asserts that the CNPPID contract violates Paragraph XVII.

The relaxation of the restrictions in Paragraph XVII that Wyoming seeks would apply equally to both Wyoming and Nebraska's apportioned shares of Glendo Reservoir water. Consequently, if such modification were granted, both Wyoming's second counterclaim and part of Nebraska's pending Count III would become moot. For that reason, Wyoming has brought this claim as

⁷ The payment for water delivered under this contract is made by Basin Electric Power Cooperative as part of an agreement between CNPPID and Basin Electric in which CNPPID agreed to credit Basin Electric's obligation to mitigate the potential further reduction of Laramie River flows under paragraph 5 of the Grayrocks Settlement Agreement with water delivered under this contract. However, the State of Nebraska, who is the actual party to the settlement agreement, has never acknowledged that delivery of Glendo water under this 8,000 acre-foot contract would satisfy any obligation of Basin Electric under the settlement agreement.

an alternative to its second counterclaim. The release of restrictions requested by Wyoming would not preclude use of Glendo water below Guernsey; it would merely allow more flexibility for use upstream of Guernsey or upstream of Glendo by exchange.

In recent responses to interrogatories, Nebraska acknowledged that Wyoming's share of Glendo Reservoir water could be used for purposes other than irrigation without injury to Nebraska's equitable apportionment, so long as the "net impact on Nebraska. . . (were) the same as if the water were used in accordance with ¶17(b) of the Decree as it presently exists." Nebraska's Answers to Wyoming's Fifth Set of Interrogatories at 13-15, Interrogatory No. 10 (Docket No. 610).

Wyoming's third counterclaim frames the issue of whether the restrictions on use of Glendo Reservoir water could be removed without violating the equitable apportionment of the North Platte River. That issue is certainly proper for adjudication in this case where issues involving the apportionment of Glendo storage under Paragraph XVII have already been accepted by the Court.

4. The Carriage Loss Values in Paragraph V are no Longer Valid, Serve No Purpose and, Therefore, Should be Removed from the Decree.

The fourth counterclaim in Wyoming's amended pleading brings to the Court a long-standing dispute that the parties have been unable to resolve by agreement despite repeated efforts.

When water is diverted through a section of the river, a portion of that water is lost to evaporation, temporary storage in the banks of the river, ground water infiltration, consumptive use by plants along the river, and other factors. Such losses are referred to as "carriage" losses in Paragraph V of the Decree. In order to accurately account for water deliveries and to accurately segregate natural flow from storage water in the river, a proper accounting of carriage losses must be maintained. Paragraph V of the Decree prescribes a procedure for accounting for carriage losses in the

North Platte River in Wyoming based on an exhibit presented by the United States in the original litigation. Paragraph V requires that the prescribed carriage loss values be used "unless and until Nebraska, Wyoming and the United States agree upon a modification thereof."

Nebraska, Wyoming and the United States agree that the carriage loss values in Paragraph V are no longer factually accurate or technically correct. For that reason, the parties jointly funded a technical study, the purpose of which was to develop new and more accurate procedures for determining carriage loss in the river. Nevertheless, after review of the new technical data, the parties have been unable to reach agreement on the appropriate formula for determining carriage losses.

The use of incorrect carriage loss values results in an incorrect accounting and segregation of natural flow and storage water in Wyoming. Under the present procedure, some water that is actually natural flow will be accounted as storage water and vice versa. Such accounting errors adversely impact the intrastate administration of water downstream of the federal reservoirs in Wyoming.

The Wyoming State Engineer determines and assesses carriage losses on the delivery of storage water throughout the state as part of his constitutional duty to administer the state's waters. Wyo. Const., art. 8, §5. Such administration of water deliveries is typically the province of state water administrators, even where the deliveries are made across state lines. Even in the North Platte River basin upstream of the federal reservoirs the Wyoming State Engineer assesses transportation loss in administering storage deliveries for a major municipal water exchange project. However, without any reason stated in the Court's opinion or in Special Master Doherty's report, the Wyoming State Engineer has been denied the ability to carry out such duties on the North Platte downstream of the federal reservoirs.

In short, there appears to be no good reason that the carriage loss provision of Paragraph V should be included in the Decree. The formula prescribed in Paragraph V has become somewhat of an historical curiosity since the parties agree that it is wrong. The Court

need not involve itself in such a matter of continuing administration. Such matters of administration are better left to state water officials who deal with them on a daily basis.

C. THE CROSS-CLAIMS AGAINST THE UNITED STATES ARE NECESSARY FOR A COMPLETE ADJUDICATION OF EXISTING COUNTER-CLAIMS.

The cross-claims in Wyoming's amended pleading would add the United States as a defendant with respect to each of the counterclaims brought against Nebraska. In addition, the fourth cross-claim would assert that the United States has undermined the equitable apportionment by the manner in which it has operated the federal reservoirs.

The Court did not apportion storage water in the 1945 Decree but left it to be distributed according to the storage contracts and the federal and state laws governing those contracts. *Nebraska v. Wyoming*, 325 U.S. at 630-631. However, the presence of large amounts of storage water in the system and the existence of contracts governing that water's use were factors that weighed heavily in the Court's equitable apportionment decision. *Id.* at 639, 645.⁸ On the average about one-half of the water that is available to meet the irrigation requirements of the lands served by diversions in the Guemsey to Tri-State section of the river is storage water.⁹ Report

⁸ Paragraph XII(b) of the Decree, while recognizing the United States' rights in storage water and in operation of the federal reservoirs, does not grant the United States free reign to operate the reservoirs in a manner that undermines the apportionment.

⁹ "Storage water", as applied to the federal reservoirs, is defined as "and water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree." Decree Paragraph XI (b). This "departure from the ordinary meaning of storage" was deemed necessary by the Court because the Decree would expressly limit the amount of natural flow that the federal reservoirs would be required to pass to the Nebraska canals. See *Nebraska v. Wyoming*, 325 U.S. at 630-631.

of Michael J. Doherty, Special Master, at 71, Table IV; *Nebraska v. Wyoming*, 325 U.S. at 605. The United States through its Bureau of Reclamation ("the Bureau") controls that storage water.

With the exception of a few small canals in Wyoming, all of the canals diverting in the Guemsey to Tri-State Dam section of the river have contracts for the delivery of storage water to meet their needs when there is insufficient natural flow. *Id.* at 628-632. In theory, when a canal does not have a right to sufficient natural flow to meet its requirements, it calls for the delivery of storage water. *Id.* at 628. In practice, the federal reservoirs are operated by the Bureau simply to meet the full requests of the canals in the Guemsey to Tri-State section, without regard to how much water is diverted or whether the water is beneficially used. United States Response to Wyoming's Sixth Set of Interrogatories at 22-24, Interrogatory Nos. 30(c) through 30(f) (Docket No. 613). Wyoming has long asserted that such an operation promotes waste and inefficiency and upsets the balance of the equitable apportionment.

By way of example, when senior canals divert more natural flow than they need, junior canals must call for more storage water to meet their requirements. The resulting depletion of storage supplies directly and adversely impacts the Wyoming users in the Kendrick Project, which is the most junior of the federal storage reservoirs and the last to refill. Such depletion of storage also results in larger and more prolonged calls by the federal reservoirs against other, junior users in Wyoming. The Bureau shares the responsibility for such waste when it passes water through the federal reservoirs to be wasted below Tri-State Dam. To redress the injury that Wyoming users suffer by the waste of water in the Guemsey to Tri-State Dam section, Wyoming must have recourse against the United States as the operator of the federal reservoirs.

The problem that Wyoming faces is brought into focus by the Court's recent opinion. The Court declared that Paragraph IV of the Decree is not a self-executing limit on the amount of water that the Nebraska canals may divert. *Nebraska v. Wyoming*, 113 S.Ct. at 1700-1701. However, the Court also expressly acknowledged that

"Paragraph IV 'limits the extent to which the Nebraska canals may stop federal reservoirs from storing water. . .'" *Id.* at 1701 (quoting brief of the United States). Wyoming had asked the Court by way of summary judgment to address the nature and extent of the Paragraph IV limitation on the ability of the Nebraska canals to call water through the federal reservoirs. The Court did not reject Wyoming's argument on the merits, but said that it must await further factual development:

Wyoming asks us to clarify that the federal reservoirs have no obligation to bypass natural flow to a senior Nebraska canal when the canal is making excessive calls for federal storage water. Because there is as yet inadequate factual development on the question whether Nebraska canals have in fact made excessive calls, we decline to do so.

Id.

Wyoming's evidence will demonstrate that the Nebraska canals have requested, and the federal reservoirs have bypassed flows or released storage water greatly in excess of the limits of Paragraph IV as well as any reasonable standard of beneficial use. Such an operation of the river is contrary to the apportionment envisioned by the Court and contrary to federal reclamation law and the laws of Wyoming and Nebraska which limit storage water rights to beneficial use. *See* Section 8 of the Reclamation Act of 1902, 43 U.S.C. §372 (1988); Wyo. Stat. §41-3-303(1977); Neb. Rev. Stat. §46-202(2) (1988 Reissue). The United States also denies the authority of the Wyoming State Engineer to administer releases from the federal reservoirs to assure that they are beneficially used. United States Response to Wyoming's Sixth Set of Interrogatories at 45-48, Interrogatory No. 58 (Docket No. 613).

If Paragraph IV of the Decree does not limit diversions by the Nebraska canals directly, and since the United States as operator of the federal reservoirs will not limit its releases from the federal

reservoirs in accordance with Paragraph IV, then Wyoming has no recourse when Nebraska attempts to increase her apportionment by demanding and receiving excess flows to the canals in the Guernsey to Tri-State Dam section. The only remedy Wyoming has in this regard is to seek clarification from the Court and modification of the Decree as necessary. The United States now appears to be on the opposite side of the issue from the position it occupied in 1945 when the Court anticipated the need for relief at the foot of the Decree. See *Nebraska v. Wyoming*, 325 U.S. at 628-629. Consequently, Wyoming must assert the claims against the United States as a party.

1. The United States is subject to the Court's Jurisdiction.

The United States may not be sued without its consent. *Kansas v. United States*, 204 U.S. 331, 341 (1907); *Arizona v. California*, 298 U.S. 558, 568 (1936). Generally, a waiver of sovereign immunity and consent to be joined in an action as a defendant can only be granted by act of Congress. *Minnesota v. United States*, 305 U.S. 382, 387 (1939). However, in *Nebraska v. Wyoming*, the United States was not sued as a defendant.¹⁰ Rather, the United States, by the Attorney General, intervened in the litigation in order to assert a claim on behalf of the United States to a separate apportionment of the waters of the North Platte River and to protect the interests of the United States in the federal reservoirs.

The Court has long held that the United States, by its Attorney General, may bring suit to assert its property interests. *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 426 (1925). The authority of the Attorney General to bring suit to protect the interest of the

¹⁰ Wyoming initially moved for dismissal of Nebraska's complaint on the ground that the United States was an indispensable party which was immune from joinder in the suit. The Court ruled that the United States was a Wyoming appropriator and not an indispensable party. *Nebraska v. Wyoming*, 295 U.S. 40 (1935). That issue was decided before the United States intervened as a party and subjected itself to the Court's jurisdiction.

United States is currently codified at 28 U.S.C. §§501, 516-519 (1988).

When the United States voluntarily brings or joins an action to assert a claim, "it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter." *United States v. The Thekla*, 266 U.S. 328, 339-340 (1924). See also *Guaranty Trust Co. v. United States*, 304 U.S. 126, 134 (1938) (the sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act). Here the subject matter is the equitable apportionment of the North Platte River and each of the claims Wyoming would bring against the United States are not only an incident to, but go to the very heart of, that apportionment.

In the present case, the United States intervened *as a party* to claim for itself an apportionment of the North Platte River as well as to defend its interest as owner and operator of the federal reservoirs. *Nebraska v. Wyoming*, 304 U.S. 545 (1938). The United States has fully participated in every aspect of this litigation. As a party, the United States is bound by the Decree. See *Arizona v. California*, 373 U.S. 546 (1963). Having thus intervened as a party and subjected itself to the jurisdiction of the Court, the United States cannot now claim that it is immune from suit in any action brought to enforce, interpret or modify the Decree.

In *Arizona v. California*, *supra*, the United States intervened as a party for the purpose of adjudicating its rights in the waters of the Colorado River. The decree entered for the purpose of carrying out the Court's opinion contained specific injunctions against the "United States, its officers, attorneys, agents and employees." *Arizona v. California*, 376 U.S. 340, 341 (1964). Likewise, in this case Wyoming requests injunctive relief against the United States to carry out the apportionment determined in the Court's earlier opinion.

Each cross-claim tendered by Wyoming bears directly on the interests the United States sought to protect by intervening in the litigation — the United States' operation of the federal reservoirs.

The United States cannot claim that is immune from suit with respect to the matters raised in the cross-claims.

2. The First Cross-Claim Merely Seeks to Join the United States as a Defendant in Claims that have Already been Accepted by the Court as Counterclaims Against Nebraska.

The first cross-claim in Wyoming's amended pleading would not raise any new issues beyond those raised by the amended counterclaims against Nebraska. As demonstrated above, by intervening in the original litigation, the United States consented to be bound by the Decree and to be subject to the jurisdiction of the Court in any litigation incidental to the Decree. The purpose of the cross-claim simply is to assert that actions of the United States or its officials are responsible for circumventing the apportionment and for the resulting injury to Wyoming and its water users.

3. The Second and Third Cross-Claims would Join the United States as a Defendant in an Existing Claim Alleging that Nebraska's Use of Glendo Reservoir Violates Paragraph XVII of the Decree and in an Alternative Claim to Modify Paragraph XVII.

The purpose of the second cross-claim is to assert that the United States is partially responsible for violation of Paragraph XVII of the Decree in entering into a water service contract for Glendo Reservoir storage water with the CNPPID. Because the Bureau is the contracting entity for water in Glendo Reservoir, no complete adjudication of the claim that the contract violates Paragraph XVII can be had without joining the United States.

Likewise, the third cross-claim would join the United States in the alternative claim to modify the Decree to remove the restrictions on the place and manner of use of Glendo Reservoir water. Wyo-

ming deems it necessary to assert this claim against the United States because the United States owns and operates Glendo Reservoir and because the United States was a party to the 1953 stipulation which gave rise to Paragraph XVII of the Decree. *Nebraska v. Wyoming*, 345 U.S. 981 (1953).

4. Wyoming's Fourth Cross-Claim would Challenge the Manner in which the United States has Allocated Water Released from the Federal Reservoirs.

The fourth cross-claim is an extension of the first counterclaim and the first cross-claim. It alleges that the Bureau's operation of the federal reservoirs has upset the apportionment and circumvented the Decree. As a predicate of the apportionment, the Court assumed that the United States would operate the federal reservoirs in a predictable manner in accordance with the storage contracts and applicable federal and state laws. The United States has not done so and as a result has undermined the equitable apportionment. Wyoming's only relief in this regard is to seek interpretation of the Decree and modification if necessary to assure the operation of the reservoirs in the manner on which the Court based the equitable apportionment.

Wyoming particularly challenges the procedure by which the United States allocates water from the federal reservoirs. When officials of the Bureau determine that the supply of storage water in the federal reservoirs is insufficient, they declare an "allocation year". In an allocation year, the Bureau allocates available storage supplies in the North Platte Project reservoirs among the contractors. The amount of water allocated to each contractor is based on the actual diversions by that contractor of both natural flow and storage water averaged over the previous 10 years. United States Response to Wyoming's Sixth Set of Interrogatories at 24-25, Interrogatory No. 30(h) (Docket No. 613). Given the fact that the Bureau does not limit its deliveries in non-allocation years, but opens the reservoir gates to meet all requests regardless of need, the

contractors are encouraged to, and do, divert excessive amounts of water in order to better their position in the allocation of storage supplies that will occur in the allocation year. Such practice promotes waste and causes irreparable injury to junior users in Wyoming whose diversions are curtailed when the senior federal reservoirs refill their depleted storage supplies. In addition, this poor practice increases the frequency of storage water shortages for storage water users in Wyoming.

Moreover, the Bureau does not recognize the North Platte project canals as having any priority over Warren Act contractors for available storage supplies. That interpretation and administration of the storage contracts is flatly contrary to the Warren Act which requires that the United States recognize "a first right" to federal storage water in the lands under the North Platte Project canals. 43 U.S.C. §523 (1988). The practice of the United States in allocating the storage water is also contrary to the plain language of the Warren Act contracts which are only to dispose of storage water that is *surplus* to the needs of the project lands. Report of Michael J. Doherty, Special Master, at 189-195. But of more importance in this case, when the United States departs from the storage contracts and applicable laws in administering the federal reservoirs, it changes the very balance of equities on which the Court based the apportionment.¹¹ As established above, the Court relied heavily on the presence of storage water and assumed its distribution in accordance with the contracts in determining the equitable apportionment.

¹¹ The United States may argue that this issue may be decided in a case pending in the federal district court in Wyoming. *Goshen Irrigation District v. United States*, Case No. C89-0161J, (D. Wyo. complaint filed June 23, 1989). Neither Nebraska nor Wyoming is a party to that case. While this issue was tried in 1989, the Judge has neither ruled nor ordered further proceedings. Wyoming believes the Judge has informally stayed that procedure pending the outcome of this Supreme Court litigation. In addition, the United States has moved to dismiss that suit on grounds of sovereign immunity. Only the Supreme Court in its original jurisdiction can acquire jurisdiction over both states and the United States and bind all of those parties in a final resolution of the issue. That is precisely what the Court did earlier in this case when it assumed jurisdiction over the pending federal district court case involving the Inland Lakes water right.

Nebraska v. Wyoming, 325 U.S. at 630-631, 639, 645. Unless the United States is directed to comply with the storage contracts and applicable laws, the apportionment prescribed in the Decree will no longer be equitable and may need to be adjusted.

5. The Fifth Cross-Claim would Join the United States in the Claim to Modify the Paragraph V Carriage Loss Formula.

Wyoming would join the United States in the claim for removal of the carriage loss provision from Paragraph V of the Decree. The United States is one of the parties who must agree to any change in the carriage loss formula under the present provisions of Paragraph V. The United States has not agreed and appears to benefit from the error generated by the present carriage loss provision in Paragraph V. Because the parties have been unable to agree, the Court's intervention is needed to break the deadlock which interferes with Wyoming's intrastate water rights administration.

D. THE CROSS-CLAIMS AGAINST COLORADO ARE INTENDED SOLELY TO GIVE COLORADO NOTICE AND AN OPPORTUNITY TO BE HEARD ON CLAIMS FOR MODIFICATION OF THE DECREE THAT WOULD AFFECT COLORADO.

Colorado was a party to the 1953 stipulation which resulted in the addition of Paragraph XVII of the Decree. For that reason Wyoming would join Colorado in the third cross-claim so that Colorado may be heard if it has any objection to Wyoming's request to remove the restrictions on the place and manner of use of Glendo Reservoir water. Similarly, Wyoming would join Colorado in the fifth cross-claim which seeks modification of the Paragraph V carriage loss formula. Wyoming believes that Colorado has no particular interest in the carriage loss formula, but would join

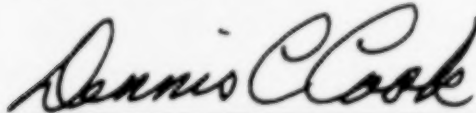
Colorado as a defendant solely for the purpose of giving Colorado an opportunity to be heard.

V. CONCLUSION

The Court should grant Wyoming leave to file the amended counterclaims and cross-claims and order replies and answers to be filed by the respective parties on a schedule to be determined by the Court.

Respectfully submitted,

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